

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2043

Cir. Ct. No. 2012TR1824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF OSHKOSH,

PLAINTIFF-RESPONDENT,

V.

ERIC R. CARLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ Eric R. Carley appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI). Carley

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

challenges the circuit court's denial of his motion to suppress evidence for lack of probable cause. We conclude that the officer had probable cause to stop Carley based on Carley's driving left of center in violation of WIS. STAT. § 346.05. We affirm.

¶2 According to the testimony at the hearing on Carley's motion to suppress evidence, City of Oshkosh police officer Brandon Bonnett was traveling east on Pearl Avenue when he saw Carley approaching him in Bonnett's lane of traffic. Bonnett first saw Carley come into Bonnett's lane when Carley was going around a turning vehicle. "[H]e went around the car to the left and in the process of doing so went into my lane around it and then into his lane." Bonnett testified that Carley's vehicle was in his lane to the extent that "it looked like all four tires," and that Carley's car came within several car lengths of Bonnett's vehicle before moving back into the right lane. Bonnett further testified that "had I continued on my current path and in my lane I would have ran head-on into him." After seeing Carley driving left of center, Bonnett turned around and stopped Carley. Bonnett noticed the odor of alcohol when he spoke with Carley, performed field sobriety tests and ultimately arrested Carley for OWI. Carley moved to suppress the evidence obtained at the stop, arguing that there was no reasonable suspicion to stop him. The circuit court denied Carley's motion ruling there was probable cause for the stop based on the officer's observation of the traffic violation. Carley was convicted of OWI. Carley appeals the circuit court's denial of his motion to suppress.

¶3 The temporary detention of individuals during the stop of an automobile by the police constitutes a seizure within the meaning of the Fourth Amendment. *State v. Popke*, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569. Whether an officer has probable cause or reasonable suspicion to make an

investigatory stop presents a question of constitutional fact. *Id.*, ¶10. As such, we will uphold the circuit court’s findings of historical fact unless clearly erroneous; however, we review de novo the application of constitutional principles to these historical facts. *See id.*

¶4 When an officer is acting upon an observation of a traffic violation committed in his or her presence and is not acting upon a suspicion warranting further investigation, the appropriate test is whether the officer had probable cause to believe that a law had been broken. *State v. Longcore*, 226 Wis. 2d 1, 8-9, 594 N.W.2d 412 (Ct. App. 1999), *aff’d by an equally divided court*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620.

¶5 An officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred.

Probable cause refers to the “quantum of evidence which would lead a reasonable police officer to believe” that a traffic violation has occurred. The evidence need not establish proof beyond a reasonable doubt or even that guilt is more probable than not, but rather, probable cause requires that “the information lead a reasonable officer to believe that guilt is more than a possibility.” In other words, probable cause exists when the officer has “reasonable grounds to believe that the person is committing or has committed a crime.”

Popke, 317 Wis. 2d 118, ¶¶13-14 (citations omitted). Here, because Bonnett stopped Carley’s vehicle based on his belief that Carley had committed a traffic violation, the question is whether the facts observed by Bonnett constituted probable cause that Carley violated WIS. STAT. § 346.05.

¶6 The observation that prompted the stop was Carley’s driving left of center, a violation of WIS. STAT. § 346.05. That statute provides that “the operator of a vehicle shall drive on the right half of the roadway ... except ... [w]hen

overtaking and passing under circumstances in which the rules relating to overtaking and passing permit or require driving on the left half of the roadway.” Sec. 346.05(1) and (1)(b). WISCONSIN STAT. § 346.09 prohibits driving to the left of center in overtaking another vehicle unless the left lane is “free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be done in safety.”

¶7 Bonnett testified that Carley was in the left lane, within several car lengths of oncoming traffic, that is, Bonnett’s vehicle, and that if he, Bonnett, had continued in his path he would have hit Carley head on. It is reasonable to infer from this testimony that Bonnett concluded that Carley’s overtaking of the turning vehicle was not being done “in safety.” Bonnett’s own observations gave him reason to believe that Carley had violated WIS. STAT. § 346.05, and Bonnett had probable cause to stop Carley. The evidence gathered pursuant to Bonnett’s stop was properly admitted.²

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

² We ordered the parties to address the viability of Carley’s appeal, as the record initially showed that Carley had entered a no contest plea, by which he would have waived the right to raise nonjurisdictional defects. The record was supplemented with the transcript of Carley’s court trial, indicating that Carley was convicted by a trial to the court on stipulated facts, not pursuant to a guilty or no contest plea.

